section the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. In this case the respondent/landlord claims possession against the appellant/tenant who seeks protection under the Act. It is not denied that the said tenant is a tenant of the premises within the meaning of the Act. And as such he is entitled to protection unless the landlord can bring himself within the proviso of section 4(2)(a) of the Act. The onus thus lay on the landlord to prove that the building was completed after the relevant date — see *Leong Yoong* v. *Lee Sem Yoong*[2] and echoed in *Yong Chiang's case*. Be that as it may, I think, the matter is now academic as the whole of the evidence is on record — see *A. V. Vandayar & Others* v. *Sivagami Achi and Another*[3] as applied in *Yong Chiang's case* (page 137).

It is always a question of law, which will warrant the interference of this court, whether there is any evidence to support the president's findings of fact and whether the inferences he has drawn are possible inferences from the facts as found. It seems to me that in this case I cannot say that he is so clearly wrong that this court can interfere. The material facts, so far as they are known, are not disputed, and the inferences which he has drawn are possible inferences from the facts found. The fact that there is no evidence of extensive or irreparable damage can find no place in determining the question whether a building is completed after the relevant date and therefore excepted from the operation of the Rent Act — see *Bank Negara Indonesia* v. *Philip Hoalim* on page 4.

I would dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *C. K. G. Pillay & Co.; Keith Sellar, Tennakoon & Pillai.*

HENRY WONG JAN FOOK v. JOHN LEE & ANOR.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J.) December 31, 1975]

[Kuching — Federal Court Civil Appeal No. 63 of 1975]

Practice and Procedure — Application to strike out paragraph of defence — Libel — Rolled-up plea — Fair comment — Not alleged to be on matter of public interest — R.S.C. 1957, O.25 r.4.

Tort — Libel — Fair comment — Not alleged to be on matter of public interest.

The appellant alleged that the first respondent wrote and published a letter which had injured the credit and reputation of the appellant. In his defence the first respondent admitted that he wrote and published the letter, but pleaded that "in so far as the words consist of allegations of facts they are true in substance and in fact and in so far as they consist of expressions of opinion they are fair comments made in good faith and without malice upon the said facts." The appellant applied by summons in chambers to have the paragraph of the defence struck out on the ground that it was not alleged that the comment was on a matter of public interest and that even if so alleged the purported comment could not be brought within "a matter of public interest." The learned judge before whom the application was brought rejected it and the appellant appealed to the Federal Court.

Held, allowing the appeal: as the defence pleaded was one of fair comment and not one of fair comment on a matter of public interest, the application to strike out the paragraph of the defence should have been allowed.

Cases referred to:-

(1) *Kemsley* v. *Foot* [1951] 2 K.B. 34.

(2) *Sutherland* v. *Stopes* [1925] A.C. 47.

FEDERAL COURT.

T. O. Thomas for the appellant.

S. Sahathevan for the respondents.

Suffian L.P. (read by **Lee Hun Hoe C.J. (Borneo)**): The plaintiff was an employee of the second defendant. On or about June 23, 1970, the first defendant (a fellow employee) wrote a letter to the plaintiff concerning the plaintiff. The first defendant apparently sent copies to the Sarawak Commercial Employees' Union, to Mr. G. Creighton (the Managing Director of the second defendant) and also to the Secretary/Accountant of the second defendant. The plaintiff pleaded that his service with the second defendant was terminated by the second defendant with effect from August 17, 1970; that the first defendant had falsely and maliciously written that letter; and that as a consequence of that letter he had been greatly injured in his credit and reputation, and in his character as a commercial employee and had been unable to get another job.

The second defendant denied having written or published the letter.

The first defendant admitted that he wrote and published it, but pleaded that "in so far as the words consist of allegations of fact they are true in substance and in fact and in so far as they consist of expressions of opinion they are fair comments made in good faith and without malice upon the said facts."

The first defendant then gave particulars as follows:—

"In December, 1969, the plaintiff was an Acting Clerk-in-charge of the [second defendant's] branch in Miri and on December 8, 1969, the defendant [a mistake for plaintiff] issued a temporary receipt signed by him to a customer for the sum of $4,760. However, the office copy of the said receipt shows a sum of $149.16 paid by another customer."

The plaintiff by summons-in-chambers applied for an order that paragraph 3 of the defence be struck out under O.25 r.4 which reads —

"The court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.",

and also under the inherent jurisdiction of the court. His counsel argued that paragraph 3 of the defence is a rolled-up plea of fair comment, that to succeed in that defence the words complained of must be shown to be (1) comment, (2) fair comment and (3) fair comment on some matter of public interest, that nowhere in the defence is it alleged that the comment is on a matter of public interest, and that even if it were so alleged, the purported comment cannot be brought within "a matter of public interest."

The learned judge before whom this application came rejected the application. He said that the crucial question was whether fair comment must be on some

matter of public interest and that he had not been referred to any binding authority whereby a defence of fair comment simpliciter has been struck out and applying the dictum of Somervell L.J. in *Kemsley* v. *Foot*,[1] he refused the plaintiff's application. Dealing with O.19 r.27 and O.25 r.4 of the Rules of the Supreme Court, Somervell L.J. there said at page 39:

"They should be applied only in plain and obvious cases, and if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O.25 r.2."

The learned judge who rejected this application said:

"It is well established that the drastic remedy of striking out a pleading or part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to discloses no arguable case."

With respect to the learned judge, I think that it is well established that the defence of fair comment cannot be on any matter but must be on some matter of public interest, as contended by Mr. Thomas for the plaintiff and that the defence pleaded here is one of fair comment and not one of justification. This is clear from *Sutherland* v. *Stopes*.[2] There the plaintiff Mrs. Marie Stopes, the famous crusader for birth control, sued the defendant for libel. Viscount Finlay said in his speech at page 61:

"The defendant Sutherland pleaded: '(4) The said words in their natural meaning are true in substance and in fact.' Paragraph 5 of his defence raised the defence of public comment on matters of public interest, and paragraph 7 was as follows: '(7) In the alternative, if, which is denied, the said words bore or were understood to bear the meanings alleged, this defendant says that in so far as the said words consist of allegations of fact the same are true in substance and in fact and in so far as the said words consist of expressions of opinion the same are fair comments made in good faith and without malice upon such facts and upon such other matters as are referred to in paragraph 5 hereof, which said facts and other matters are matters of public interest.' The defence contained particulars of paragraph 4 and of paragraphs 5 and 7. These defences are to be taken to have been also raised by the second defendants.

It is clear that the truth of a libel affords a complete answer to civil proceedings. This defence is raised by a plea of justification on the ground that the words are true in substance and in fact. Such a plea in justification means that the libel is true not only in its allegations of fact but also in any comments made therein.

The defence of fair comment *on matters of public interest* is totally different. The defendant who raises this defence does not take upon himself the burden of showing that the comments are true. If the facts are truly stated with regard to a matter of public interest, the defendant will succeed in his defence to an action of libel if the jury are satisfied that the comments are fairly and honestly made. To raise this defence there must, of course, be a basis of fact on which the comment is made.

For a good many years past a practice has prevailed of raising this defence by what has been called the 'rolled up plea,' but it will be found that this term is a misnomer based on a misconception of the nature of the plea. Such a plea states that the allegations of fact in the libel are true, that they are of public interest, and that the comments upon them contained in the libel were fair. The allegation of truth is confined to the facts averred, and the averment as to the comments is not that they are true but only that they were made in good faith, and that they are fair and do not exceed the proper standard of comment upon such matters.

There has been a good deal of misconception as to the nature of this plea. It has been sometimes treated as containing two separate defences rolled into one [namely justification and fair comment], but it in fact raises only one defence, that being the defence of fair comment on *matters of public interest*. The averment that the facts were truly stated is merely to lay the necessary basis for the defence on the ground of fair comment. This averment is quite different from a plea of justification of a libel on the ground of truth, under which the defendant has to prove not only that the facts are truly stated but also that any comments upon them are correct."

As the defence pleaded here is one simply of fair comment and not one of fair comment on a matter of public interest, I would with respect agree with Mr. Thomas's contention that the learned judge should have allowed his application to strike out paragraph 3 of the defence.

This should not however prevent the defendants from applying to amend their defence before this matter comes to trial.

I would therefore allow this appeal, with costs here and in the court below. Deposit to be paid to appellant.

Lee Hun Hoe C.J. (Borneo) and **Wan Suleiman F.J.** concurred.

Appeal allowed.

Solicitors: *Thomas & Co.; Battenberg & Talma.*

SIM KIM ONG v. GOH PHAIK SOOI

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J.) December 31, 1975]

[Kuching — Federal Court Civil Appeal No. 96 of 1975]

Family Law — Whether High Court in Sarawak has jurisdiction to entertain a joint petition for divorce by mutual consent where the marriage is celebrated outside Sarawak — Sarawak Matrimonial Causes Ordinance (Cap. 94), s. 7.

In this case the parties were married before the Registrar of Marriage in Aberdeen, Scotland. After the marriage they returned and cohabited at various places in Sarawak. The learned trial judge held that the High Court had no jurisdiction to entertain the petition as the marriage was not celebrated before a civil authority in Sarawak. The appellant appealed.

Held, allowing the appeal: (1) the High Court has jurisdiction in divorce proceedings in respect of marriages celebrated outside Sarawak, provided the husband is domiciled in Sarawak or being of the Asiatic race has been habitually resident in Sarawak for two years or more;

(2) the court may therefore exercise its discretion in a proper case to dissolve a marriage by mutual consent even though the marriage was celebrated outside Sarawak;

(3) the case would be referred back to the High Court for hearing.

Cases referred to:-

(1) *Liu Kui Tze* v. *Lee Shak Lian* [1935] S.C.R. 85.

(2) *Nachimson* v. *Nachimson* [1930] P. 217.

(3) *R.* v. *Liverpool Justices* (1883) 11 Q.B.D. 638, 649.

(4) *Cox* v. *Hakes* (1890) 15 App. Cas. 506, 529.

(5) *Blackwood* v. *R.* (1882) 8 App. Cas. 92, 94.

(6) *F.* v. *F.* [1949] S.C.R. 7.

(7) *David Michael Chen* v. *Leonara Chen*, Sarawak High Court Matrimonial Cause No. M/6/55.

(8) *T.O. Thomas* v. *S.R. Thomas*, Sarawak High Court Matrimonial Cause No. M/7/62.

(9) *Salvesen or Von Lorang* v. *Administrator of Austrian Property* [1927] A.C. 641.

(10) *Le Mesurier* v. *Le Mesurier* [1895] A.C. 517.